



April 6, 2017

VIA FIRST CLASS MAIL AND EMAIL (Pamela.Monroe@sec.nh.gov)

Pamela G. Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

**RE: Petition of the Town of Bethlehem, *et al.* for Declaratory Ruling
Docket No. 2016-03**

Dear Ms. Monroe:

Attached for filing in the above-reference matter, please find the **Motion of the Society for the Protection of New Hampshire Forests for Rehearing on Order Dismissing Petition for a Declaratory Ruling**. A copy of the attached has this date been forwarded via email to all parties on the Distribution List.

Please be advised that we will submit an addendum to this motion indicating the positions of other parties with respect to this filing.

If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,

Nicole M. Manteau
Firm Administrator

/nmm
Enclosure
cc: Client
Distribution List (via email)



STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2016-03

Petition of Town of Bethlehem *et al.*
for a Declaratory Ruling

**MOTION OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE
FORESTS FOR REHEARING ON
ORDER DISMISSING PETITION FOR A DECLARATORY RULING**

The Society for the Protection of New Hampshire Forests (the “Forest Society”), by and through its attorneys, BCM Environmental & Land Law, PLLC, moves to rehear the March 7, 2017, decision dismissing the Petition for a Declaratory Ruling. In support, the Forest Society states as follows:

AUTHORITY FOR REHEARING

1. The Forest Society, as a party to this proceeding, may move for a rehearing of the March 7, 2017, Order. RSA 541:3; N.H. CODE ADMIN. R. ANN. Site 202.29.
2. A motion for rehearing serves a two-fold purpose: first, it permits the reviewing authority to reconsider its decision, and second, it is a requirement prior to filing an appeal to the New Hampshire Supreme Court. N.H. CODE ADMIN. R. ANN. Site 202.29; N.H. Supreme Ct. R.10.
3. Based on the Administrative Procedures Act, the SEC’s Administrative Rules, and the Supreme Court Rules, to preserve these issues for appeal, the Forest Society files this Motion for Rehearing.

BACKGROUND

4. On December 19, 2016, the Towns of Bethlehem, Bridgewater, Bristol, Clarksville, Deerfield, Easton, Franconia, Littleton, New Hampton, Northumberland, Pembroke,

Pittsburg, Plymouth, Stewartstown, Sugar Hill, Whitefield, and Woodstock; the City of Concord; the Ashland Water and Sewer Department; the Society for the Protection of New Hampshire Forests (the “Forest Society”); and the Appalachian Mountain Club (the “Petitioners”), filed a Petition for Declaratory Ruling (the “Petition”) pursuant to Site 203.

5. The Petition requested the Committee issue a declaratory ruling stating as follows:

“pursuant to RSA 231:160 et seq., only municipalities have the authority to authorize or not authorize the erection, installation, or maintenance of electric power poles or structures or underground conduits or cable, or their respective attachments or appurtenances, on, across, or under locally maintained highways, regardless of whether the New Hampshire Department of Transportation (the “NHDOT”), the SEC, or other agencies have authority to permit or license other portions of any proposed facility.”

Petition for Declaratory Ruling, Docket No. 2016-03, at p. 14 (Dec. 19, 2016).

6. On January 4, 2017, the SEC issued a *Notice of Public Meeting on January 12, 2017 and Meeting Agenda*. Docket No. 2016-03 (Jan. 4, 2017).
7. On January 9, 2017, Northern Pass Transmission, LLC (“NPT”) and Public Service Company of New Hampshire d/b/a Eversource energy (“PSNH”), filed a Motion to Dismiss the Petition.
8. At the hearing, the Petitioners requested additional time to file a response to the Motion to Dismiss. The Committee, on its own motion, dismissed the Petition and denied this request.
9. A written order memorializing this dismissal was issued on March 7, 2017.

LEGAL STANDARD

10. Pursuant to RSA 541:3, “any person directly affected” by an order or decision has the right to file a motion for rehearing.
11. Site 202.29(c) allows such a party to submit a motion for rehearing within thirty days of the decision or order.

12. The Forest Society is directly affected by the SEC's March 7, 2017, Order, as the Forest Society's requested relief was denied.
13. A party may apply for a rehearing by "specifying in the motion all grounds for rehearing," RSA 541:3, and "set[ing] forth fully every ground upon which it is claimed that the decision or order complained of is unlawful and unreasonable." RSA 541:4.
14. The SEC rule on rehearing further provides that a motion for rehearing shall: "(1) Identify each error of fact, error of reasoning, or error of law which the moving party wished to have reconsidered; (2) Describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable; (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and, (4) Include any argument or memorandum of law the moving party wishes to file." N.H. CODE ADMIN. R. ANN. Site 202.29(d).

ANALYSIS

I. The January 4, 2017, Notice did not Provide Fair and Adequate Notice to the Parties in Accordance with Administrative Procedure Act and the SEC Rules

15. First, the Committee should grant a rehearing on this Petition because the January 4, 2017, notice did not provide fair and adequate notice to parties that this hearing was an adjudicative hearing or anything more than a discussion of scheduling.
16. Site 202.01 states that the Committee "shall conduct an adjudicative proceeding regarding an application or petition . . . in accordance with the administrative procedure act, RSA 541-A, and these rules." N.H. CODE ADMIN. R. ANN. Site 202.01.
17. In matters before the SEC, an adjudicate hearing is "a public hearing held by the committee in an adjudicate proceeding." *Id.* Site 102.04.
18. A notice of such a hearing shall be issued by the committee or subcommittee, as applicable, "shall contain the information required by RSA 541-A:31, III" *Id.* Site 202.09

19. RSA 541-A:31, I provides that an agency “shall commence an adjudicatory proceeding if a matter has reached a stage at which it is considered a contested case”
20. RSA 541-A:31, III provides that the notice for the adjudicatory hearing must be “reasonable” and include the following: “(a) A statement of the time, place, and nature of the hearing[;] (b) A statement of the legal authority under which the hearing is to be held[;] (c) A reference to the particular sections of the statutes and rules involved[;] (d) A short and plain statement of the issues involved. Upon request an agency shall, when possible, furnish a more detailed statement of the issues within a reasonable time[;] (e) A statement that each party has the right to have an attorney present to represent the party at the party's expense[; and] (f) For proceedings before an agency responsible for occupational licensing as provided in paragraph VII-a, a statement that each party has the right to have the agency provide a certified shorthand court reporter at the party's expense and that any such request be submitted in writing at least 10 days prior to the proceeding.”
21. In regards to the Petition, the notice included an agenda that stated “The Committee will discuss how it will proceed in considering the Petition.” *Notice of Public Meeting on January 12, 2017 and Meeting Agenda*. Docket No. 2016-03 (Jan. 4, 2017).
22. This notice does not comply with the requirements of RSA 541-A:31 and did not adequately inform parties of what to expect at this hearing.
23. Specifically, it does not include the legal authority under which the hearing was to be held, a reference to the particular sections of the statutes and rules involved, or a statement that each party has the right to have an attorney present to represent the party at the party's expense.
24. Further, the description that the committee would *discuss* how it *will proceed in considering* the Petition suggests to a reasonable reader that this hearing was meant to be a discussion of

how a future consideration of the Petition will occur—not a consideration of the merits of the petition.

25. As such, parties could not determine if it was necessary to prepare for oral argument on the merits, or merely prepare to discuss procedural matters.
26. When the undersigned called Counsel for the SEC to ask for clarification on what to expect at this hearing, including whether she would be expected to give oral argument on the merits, Counsel was unable to provide any clarification.
27. Therefore, the Committee erred when it denied the Petition on its own Motion and, accordingly, did not rule on the Petitioner's request for more time to file a written response to the pending Motion to Dismiss.
28. This lack of adequate notice is an error of law that violates the Forest Society's due process rights and conflicts with the intent of the Administrative Procedure Act and the SEC rules.
29. The Forest Society proposes a rehearing to allow the Petitioners adequate time to prepare for a hearing and respond to the Motion to Dismiss.

II. The Petitioners did not Have an Opportunity to File a Reply to the Motion to Dismiss

30. The lack of clarity from the inadequate notice was further compounded when NPT and PSNH collectively filed a Motion to Dismiss a mere three days before the hearing.
31. The Committee's Order memorializing the decision stated that the reason for dismissal was that the Petition involved a hypothetical situation or otherwise sought advice as to how the Committee would decide a future case and was "redundant and contrary to notions of administrative efficiency." *Order*, at 4.
32. This reasoning reflects arguments raised in the Motion to Dismiss. *Motion to Dismiss*, at 2, 6-7.

33. While the Committee notes that the arguments made in the Motion to Dismiss were not relevant, it did not state that those arguments played no role in its decision. In fact, Representatives of NPT and PSNH were present and repeated many of these arguments in favor of dismissal at the hearing. It is reasonable to assume members of the Committee considered NPT's and PSNH's arguments in making its decision, even though the Petitioners did not have the opportunity to reply in writing.
34. Petitioners requested additional time to file a response. This request was denied because the Committee dismissed the Petition on its own Motion. *Order*, at 5.
35. This is contrary to the SEC rules. The rules provide parties 10 days to file a response to a motion, and the presiding officer at the hearing shall rule upon a motion only after "full consideration of all objections and other factors relevant to the motion." *See* N.H. CODE ADMIN. R. ANN. Site 202.14.
36. Therefore, the Committee erred when it dismissed the Petition allowing Petitioners to file an objection to the Motion to Dismiss and then considering the Motion and Objection in considering the Petition.
37. The Forest Society proposes a rehearing that allows the Petitioners adequate time to prepare for a hearing and respond to the Motion to Dismiss.

III. The Petition did not Properly Dismiss the Petition Pursuant to Site Rule 203.03(c).

38. The Order explains that the Committee appears to have dismissed the Petition on its own Motion because (1) it involved a hypothetical situation or otherwise seeks advice as to how the committee would decide a future case and (2) the request "is redundant and contrary to the notions of administrative efficiency." *See Order*, at 5.

39. The SEC may not dismiss a petition that: (1) sets forth factual allegations that are definite and concrete; (2) does not involve a hypothetical situation or otherwise seek advice as to how the committee would decide a future case; (3) implicates the legal rights or responsibilities of the petitioner; and (4) is within the committee's jurisdiction. N.H. CODE ADMIN. R. ANN. Site 203.02(c).
40. First, the Committee should grant a rehearing because a Petition may not be dismissed because the Committee finds that it is redundant or contrary to the notions of administrative efficiency. This is not one of the reasons stated in Site 203.02(c).
41. Second, the Committee should grant a rehearing because its finding that the Petition involved a hypothetical situation or sought advice on a future case is unreasonable.
42. The Petitioners filed this Petition because they sought clarification of a statute and the jurisdiction of the SEC that would impact their interests generally and more particularly in the Northern Pass Docket.
43. The Northern Pass Docket is neither hypothetical nor a future case; it is a present docket that is impacted by resolution of this matter. The Committee itself acknowledged that the issue raised in this Petition is an active issue in the Northern Pass Docket. *Order*, at p. 5; *see also Motion for Expedited Order Relative to Local Permits, Licenses and Ordinances*, Docket 2015-03 (Mar. 13, 2017).
44. The Rules provide for dismissal of a Petition that raises a hypothetical case or impacts a *future* docket—this reason for dismissal does not apply to a concrete and definite issue that is raised, for example, in at least one present docket.
45. Therefore, the Order dismissing the Petition is unlawful and a rehearing should be granted.

WHEREFORE, the Forest Society respectfully requests that the Committee:

- A. Grant this Motion;
- B. Expeditiously schedule a rehearing on the Petition for a Declaratory Ruling and the Motion to Dismiss the Petition; and
- C. Grant such further relief as it deems appropriate.

Respectfully Submitted,

**SOCIETY FOR THE PROTECTION OF
NEW HAMPSHIRE FORESTS**

By its Attorneys,

BCM Environmental & Land Law, PLLC



Date: April 6, 2017

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this day, April 6, 2017, a copy of the foregoing Motion was sent by electronic mail to persons named on the Service List of this docket.



Amy Manzelli, Esq.